

Adoption Hearing Transcript for R125-11  
January 15, 2013  
10:00 A.M.

Appeared in Carson City:

Stacey Crowley, Director of the Nevada State Office of Energy

Suzanne Linfante, Program Coordinator for the Nevada State Office of Energy

Jeff Fontaine, Nevada Association of Counties

Appeared in Las Vegas:

Douglas Brooks, NV Energy

**Director Crowley:**

Good morning, my name is Stacey Crowley and I am the Director of the Nevada State Office of Energy. This hearing is being conducted to afford all interested parties a reasonable opportunity to comment upon proposed regulation R125-11 regarding the amendment of the uncodified adopted regulations R094-10. I am conducting this hearing in Carson City with video conference to Las Vegas. We offered an opportunity for those to call in, but there was nobody calling in on a conference line. Be sure to sign-in on the sign-in sheets, and indicate if you will be commenting today. If you have written comments let me know. Doug do you have any written comments?

**Douglas Brooks:**

No, no written comments and I do not intend to give any oral comments or testimony.

**Director Crowley:**

Ok. Thank you. All comments will be posted on the office of energy website. There are handouts in the room. Doug, I want to make sure you have got everything. There is a copy of the proposed regulation and it says revisions January 10, 2013, and we also have a list I will go through in a second.

I have with me here Suzanne Linfante. She is the program manager for this tax abatement program within our office.

I am going to go through the explanation of the process that has gone on to date because it's fairly lengthy and I want to make sure everyone understands the process that we have gone through.

We had an informal stakeholder session that was held on May 29, 2012, to gather comments on any proposed revisions to the regulations, R094-10. It's also in response to legislative changes that basically merged the renewable energy and energy efficiency authority into the office of energy. So we had to make some changes because of that.

Then we held a public workshop on June 7, 2012 to solicit comment on the proposed regulations and we held an adoption hearing July 25, 2012 as well as October 15, 2012 because there was additional comments received after both hearings. The additional

comments warranted a revision to the regulations and therefore we held our final adoption hearing on October 15, 2012, is that right, Suzanne?

**Suzanne Linfante:**

Yes.

**Director Crowley:**

As the process goes we had a hearing on November 1, 2012 in front of the Legislative Commission Subcommittee to Review Regulations. That subcommittee, deferred the adoption of these regulations due to concerns primarily raised by Assemblywoman Marilyn Kirkpatrick.

Following that subcommittee deferment, we had gathered the comments from the hearing and crafted a memo and that was dated November 14, 2012 and sent to Assemblywoman Kirkpatrick on November 15. That piece of information is also included in this hearing as evidence. We wanted to make sure that we understood Assemblywoman Kirkpatrick's concerns and the subcommittee's concerns. The memo described our understanding of the issues raised during the subcommittee meeting.

We followed up with an in-person meeting with Assemblywoman Kirkpatrick on November 20, 2012 and we sent revised proposed regulations to Ms. Kirkpatrick on November 28, and followed up on December 3, and December 27 for her review. We haven't heard final comments from her, but are hoping we have addressed her concerns.

One issue she asked us to confer with the Governor's Office of Economic Development and that was regarding the definition of management and administrative employees. She had thought there might be existing language in state regulation with regards to that definition. The Governor's Office of Economic Development replied to us on December 28, 2012, that in fact there was no definition of management and administrative employee in their existing regulations.

Pursuant to NRS 701.220 subsection 5, the Director must conduct at least one hearing, after giving 30 days' notice, before adopting any regulations pursuant to this section. In the handouts, we have provided you again a copy of the hearing notice, a copy of the Proposed Regulations dated January 10, 2013, as well as a copy of the memo sent to Marilyn Kirkpatrick on November 15, 2012. The memo is dated November 14.

We have provided 30-day written notice in advance of this hearing to inform the public of the general topics to be discussed; namely, the amendment of R094-10 to implement the provisions of NRS 701A.300- 701A.390. Copies of the hearing notice, previous amendments, and comments are available on the energy website at [www.energy.nv.gov](http://www.energy.nv.gov). After each hearing, the minutes of the hearing will be posted within 30 days to allow members of the public to review the comments.

We will be taking comments if necessary. There are only two of you here and Doug already explained that he will not be commenting. What I want to do is briefly go over

the changes that have occurred since the Legislative Subcommittee to Review Regulations happened so that it's clear. The memo that we attached also helps describe that.

The proposed revisions dated January 10; I am going to go through just the sections that have changed since that hearing. That starts with section 13 of proposed regulation R125-11. That would begin on page 15 of the proposed adopted regulation. Under Section 24.2.a, it's a modification to the uncodified R094-10; we've clarified that for a full-time employee, that is someone who works an average of 40 or more hours per week. However, if an employee works, what we added and this is to address Assemblywoman Kirkpatrick's concerns, if an employee works an average of less than 40, but more than 35 hours, they are still considered full-time and entitled to the same health benefits of a full-time employee. There was some confusion as to what the definition of a full-time employee and through the Department of Labor, we found a definition that said a part-time employee is someone that works 35 hours or less, so we inferred that somebody that works more than 35 hours would be considered full-time. What we wanted to make sure to address with Assemblywoman Kirkpatrick's concerns is that those folks who worked between 35 and 40 hours would still be considered full-time in respect to getting health coverage by their employer.

We also addressed a concern in Section 24.2.b. and that was in regards to establishing the fact that an employee was in fact a Nevada resident. We eliminated the comment, the statement that, we would allow "any other identifying documentation which is approved by the director". That was considered not an identifiable comment and we added "possesses a valid Nevada driver's license, or a current and valid state identification card" issued by the Department of Motor Vehicles. Just to help clarify that issue.

Any questions on those two proposed revisions?

Ok. I'll move and we'll go to section 24.7.a under subsection 2, Roman numeral III. This has to do with the definition of a management or administrative employee. I am not sure this was fully addressed from Assemblywoman Kirkpatrick's concerns. I am sorry; I am going to back up. I missed another change that happened as a result of that subcommittee meeting. That is section 24, subsection 5(g) and that has to do with health benefits and we added a statement under (g) that the Director may approve a minimum employer contribution of less than 80% if an employer, and this is what we added, of a Nevada company with less than 10 employees submits a written request stating reasonable grounds for such an exception. The quote of a "Nevada company with less than 10 employees" was added to address Assemblywoman Kirkpatrick's concerns. The original intent of this was to allow for small Nevada companies who may have a different health coverage policy be allowed to at least explain their reasoning and perhaps the director might allow that to be eligible.

Then, we'll move onto Section 24.7.a, subsection 2, Roman numeral III, you will see is added there, that is a new statement under subsection 2, Roman Numeral III. Again that was to clarify the definition of management and administrative employee and that an employee that is compensated on a salary or fee basis would also have to have the authority to hire, fire, advance, promote or otherwise change the employment status of an employee to be considered management or administrative. Again, it was difficult to find a definition of this term. We looked to the Governor's Office of Economic Development, we looked at the federal websites and definitions, and this comes from the Department of Labor as well. Hopefully this addresses Ms. Kirkpatrick's concerns.

Any questions on those two sections?

Lets' move on to section 15 of the proposed regulations and we'll move to page 20 and 21. They are under section 15 of our proposed regulations, section 26 of LCB file number R094-10. It has to do with purchased and leased equipment. What was discussed at the Subcommittee Hearing to Review Regulations was the idea that leased equipment, should it be or should it not be subject to a sales and use tax abatement under this abatement program. During discussions at our hearings it was stated that the Department of Taxation used purchased and leased equipment sales and use tax similarly. So we wanted to utilize state protocol and treat purchased and leased equipment similarly. However, Assemblywoman Kirkpatrick stated that during the establishment of this legislation it was the intent of the committee to not allow leased equipment to be included. After discussions with Assemblywoman Kirkpatrick following our subcommittee meeting it was unclear to me how to handle this. What we did do in the original proposed regulations was split out purchased and leased equipment only for power tools and motorized heavy equipment. That's under section 15, which is section 26(1)(f and g), motor vehicles and power tools, to split out and better define purchased versus leased equipment. Our proposed language for exclusive use on the site of the facility and that will remain on the side of the facility throughout the construction of the project or operation of the facility to be eligible for sales and use tax abatement. We have proposed to leave that in, but it still remains a point of discussion that may need further review.

Any comments on that?

**Jeff Fontaine:**

For the record, I am Jeff Fontaine, I am the Executive Director of the Nevada Association of Counties. I think we share the concern that was raised by Assemblywoman Kirkpatrick regarding the partial tax abatement for sales and use taxes for leased equipment and as I understand it, the concern she raised has to do sort of with the spirit of the law, AB 522. That is, to stimulate economic growth through the purchase of equipment and investment in infrastructure in the state of Nevada as a result of having the ability to receive the partial tax abatement. So, we would also question how granting of partial tax abatement to leased equipment would accomplish that goal. I think the other concern we would have is just the administrative portion of this and how you would actually administer and implement a partial tax abatement for leased equipment if in fact it's not the applicant that is paying those taxes, but it's the owner that's paying those taxes. We think that

would create really a lot of potential for problems and difficulties so we would go on record as supporting removing this provision to allow partial tax abatement for leased equipment.

**Director Crowley:**

Thank you. Any comments in Las Vegas regarding that topic?

**Douglas Brooks:**

No. No comments.

**Director Crowley:**

I am going to come back to that. I'd like to consider that comment here in a minute. I want to make sure I go through all of the proposed changes and then ask for any additional questions and then I'd like to take a couple minutes and consider that comment. I believe I have addressed all of the comments that have come as a result of the Subcommittee Meeting to Review Regulations and I want to make sure there aren't any other general comments regarding the proposed regulations R125-11 as you see here in full with revisions dated January 10, 2013. I am happy to take questions on any portion of these proposed regulations at this time.

**Jeff Fontaine:**

Thank you, Director Crowley. Again this is Jeff Fontaine with NACO. So I just had a couple questions with regards to proposed regulations and the first one has to do with the application process and that would be section 7 on page 7, subsection 7, excuse me, of section 7 which states that an applicant shall amend his or her application not later than 15 business days after any significant change that is applicable to the application. I am not quite clear as to how the relates to the application process and how it would be implemented.

**Director Crowley:**

Ok. Thank you.

**Suzanne Linfante:**

Suzanne with the Nevada State Office of Energy. I think what that's stating is, it's a standalone item, you submit your application and something changes that would impact the approval of the application. If you had a significant change, like you were going to produce significantly more or significantly less, your wages were going to change, you would have to amend the application and send in an amended application. If you had that significant change.

**Director Crowley:**

So it's outside of the other process that is described above in section 5 and 6.

**Suzanne Linfante:**

Right.

**Director Crowley:**

We took out the pre-application process and condensed it into one application process and that language might have come from the pre-application process. That's a good question and I guess we should make sure that it's clear and that that acts as a separate item and that stands as a subsection of section 7 as you stated. That's from LCB R094-10, section 16. I am going to review section 16 of the uncoded regs.

**Jeff Fountaine:**

Director Crowley, if I might add. I think the question is so if there is an amendment to an application, then what happens? What's the process that follows?

**Director Crowley:**

It's hard to see these two regulations together and I want to make sure that we are clear as to what happens and I wonder if that's described in the original regs. Ok, I see where it came from now. It came from original regulations R094-10 and it's under their section 17, subsection 7 and that's all the explanation that it gives in these regs. I wonder if it needs further explanation.

**Suzanne Linfante:**

Would a fix just be an applicant shall amend and file? Because I think what happened is, when we had the pre-application process things may have changed when they got to the application process and this carried over with that assumption.

**Jeff Fontaine:**

Right.

**Suzanne Linfante:**

So if there is a change from your original application we would need to know so perhaps it just needs to say amend and file.

**Jeff Fontaine:**

Right, but even if it's filed then what? Because, you have very specific timelines and requirements in terms of what you do after it's filed. So, let's say an applicant files and application, you started the process with notifying with the appropriate entities, the department of taxation has already begun their fiscal analysis, and then an applicant files an amended application, then what?

**Director Crowley:**

Do we start the process over?

**Jeff Fontaine:**

Do we start the process over? Does the clock start over?

**Director Crowley:**

It's a good question. Maybe what we'll do is try to find something, some language that is already existing in the regs and it might be that we take that section out of where it's sitting now and put it back in the process of applying. So what I might do is take a 10 minute pause here if you don't mind and just look into this.

**Jeff Fontaine:**

Yeah, I am sorry to bring this up.

**Director Crowley:**

No it's ok.

**Jeff Fontaine:**

I think it makes the process a lot clearer because there will likely be a case or cases where that might happen.

**Director Crowley:**

I am going to take a 10 minute break.

The issue is regarding the statement that the applicant shall amend his or her application not later than 15 business days after any significant change that is applicable to the application. That is a remnant of the pre-application phase and we believe it needs more clarification. What I'd like to suggest is that we amend that statement to say "an applicant shall amend his or her application and submit to the Director not later than 15 days after any significant change that is applicable to the application has been identified" and what we'll do is in our application, note that the amended version will have to go through the same process as the original version.

**Douglas Brooks:**

Director, by that do you mean to say that an amended application will in essence restart the process?

**Director Crowley:**

Yes, and in some cases it might be minor enough that, what we want to make sure is that the local jurisdiction, the county and the department of tax, and those that received the application are afforded the right to look at the amended application and so it would go through, in terms of the Director's responsibility to send that and forward that do the other jurisdictions we would do that. Just as it would have originally. There are no time triggers in these regs that would set off another 120 days. There is nothing in our regs that gives specified days. It's just that the process takes what it takes in terms of getting fiscal impact notes and allowing the counties to review it.

**Douglas Brooks:**

Thank you.

**Director Crowley:**

In regards to the section on equipment eligible for sales and use tax, which is section 15, subsection (f) and (g), we are going to go back to the original language of the adopted regulations, R094-10. That does not distinguish between purchased or leased. So what we would do is remove the statement "or leased" from section (f) and in section (g) we would return the word "purchased" back to the first sentence, remove it from subsection one and remove all of subsection two and bring back the language "construction of the project".

With that, I will make those changes as well as the other changes proposed in revisions dated January 10, 2013 and hereby adopt these regulations to move forward.

Any questions? Yes, Jeff?

**Jeff Fontaine:**

So what does that mean in terms of leasing of equipment, are they subject to partial tax abatements or not?

**Director Crowley:**

Well, the original language does not mention leased equipment and our understanding is that the taxation department equates leases and sales the same in terms of, in their definition.

**Jeff Fontaine:**

It's a taxation issue? It's a department of taxation issue?

**Director Crowley:**

We would have to request an explicit statement that excludes leased equipment for it to be completely clear. Now we could do that, but that would take, a legislative change. Right now, as stated by the department of taxation, they view leased and purchased equipment the same in terms of sales and use tax. So developers, applicants, would likely request a sales and use tax abatement on leased equipment. Frankly, this is a tough decision because we clarified it with the language that was proposed so that we said if it was explicitly for use of the site and the facility, but taking that out we now open it up to more question as to whether leased equipment has to be used for the exclusive use of this facility or not.

**Jeff Fontaine:**

If I may, I understand your decision and I understand that really as far as taxation is concerned, you know how they view it, so I understand that part. I think quite frankly the threshold question here is whether or not it was legislative intent to allow leased equipment to be eligible and subject to partial tax abatement and if it was legislative intent then I think what you have done is fine, but if it wasn't then I think there is a problem with the way the regulation is written. So I go back to the concerns that were expressed by Assemblywoman Kirkpatrick who quite frankly was one of the major sponsors, if not the major sponsor, of AB 522 and I've got to look at what her concerns were and we would agree with that. So I think that's really the question quite frankly.



**Director Crowley:**

We could request an Attorney General opinion on the intent of the legislation and not of these regs, of the legislation. Frankly, we just want to follow the intent of the legislation. We could not find, at least in our initial search, that it was explicitly prohibited or included. We can continue to search and if that's a concern what I might do is postpone the adoption of these regs today and I am happy to do that. I'd rather be sure. A month or two here or there is less important than getting this right. If we can all agree on the intent and get feedback on that and confirmation that whatever decision we make, everybody is in agreement with that's the way we go. In which case we would delay the adoption of this hearing. Which is fine. Right now the adopted regulations 094-10 are in place and being utilized under our hearing processes today. We can continue to do that until we get this particular issue settled. I think all of the other clarifications materially affect applications underway right now.

**Jeff Fontaine:**

Can I ask a question?

**Director Crowley:**

Sure.

**Jeff Fontaine:**

In your conversation with department of taxation, when they treat sales and use tax for leased equipment, did they express any concern about the lessor or the owner of the equipment frontloading or leasing equipment whereby they put most of their tax that they paid on the equipment in the lease, thereby, if they were partially abated and purchase the equipment they would actually get the tax break. In other words when they look at how the equipment owner would report their tax and pay their tax to the department of taxation, how do they do that? Do they have to prorate it based on the leased equipment or can they do it, how do they do that? I guess that's the question.

**Director Crowley:**

My understanding and I have to get clarification, is that you can do it either way. You can either pay for it on one lump sum all at once, the owner of the equipment. Or, I believe, and again I have to get clarification, they can pay over time.

**Jeff Fontaine:**

Do they pay their tax like property tax and pay in installments. The questions is how would they treat or build that into a lease and how would they administratively decide what the tax abatement would be and how would they build that into a lease? That's the part that quite frankly, I don't quite understand.

**Director Crowley:**

It might be that the lease price is subject to the market. It might have nothing to do with if the owner has paid tax upfront or over time.

**Jeff Fontaine:**

So how do they get the tax abatement? Who gets the tax abatement?

**Director Crowley:**

The Lessee, so the person who is leasing the equipment. When I lease a car, when I have a three year lease on a car, the person I am leasing it from. The company imbeds the sales and use tax in the payments every month. That's how the department of taxation described it to me on the phone. They compared it to leasing a car.

**Jeff Fontaine:**

What's to prevent that owner of the equipment from imbedding a disproportionate amount of the tax? In the lease and that have that partially abated. Or fully abated.

**Director Crowley:**

I don't know if there is anything and frankly it's what the market is willing to pay for the lease of that car. I could pay \$10,000 a month if I thought it was the right thing to do. They could imbed any number, they could imbed profit.

**Jeff Fontaine:**

Right.

**Director Crowley:**

There are enough questions that we're going to delay the adoption of these regulations until we can get clarification on the intent of the legislation. I'm going to need to get that clarification from the Legislative Counsel Bureau and perhaps even an Attorney General's opinion.

So with that I am going to close the hearing. Thank you for your attendance. We'll be in touch.